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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-919

BRITISH AMERICAN COMMODITY OPTIONS CORP.,

Petitioner,

—against—

THE COMMODITY FUTURES TRADING COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHARLES J. HECHT
Attorney for Petitioner
Suite 1760
60 East 42nd Street
New York, New York 10017
(212) 490-3232

Of Counsel:

HAIG COSTIKYAN

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CONSTITUTIONAL PROVISION

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In the

Supreme Court of the United States

October Term, 1977

No. .....

British American Commodity Options Corp.,

Petitioner,

—against—

The Commodity Futures Trading Commission,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on August 3, 1977.

Official and Unofficial Reports of the Opinions Below

This case originated by the filing of a complaint by the plaintiff Commodity Futures Trading Commission (the "CFTC") in the United States District Court for the Southern District of New York against the defendant British American Commodity Options Corp. ("British American"). At the close of the plaintiff's case, the Honorable Lee P. Gagliardi rendered a decision granting defendant's motion to dismiss the plaintiff's request for a preliminary

e trial court's Opinion and Order
appear as Appendix A. The case
22 F. Supp. 662, and is unofficially
Fut. L. Rep. ¶20,224.

e case to the United States Court
nd Circuit. That Court reversed
al of the CFTC's request for a
nd remanded with direction to
ction. The Opinion of the Circuit
d in 560 F. 2d 135, and is unoffi-
Comm. Fut. L. Rep. ¶20,457. A
ears as Appendix B.

urisdiction

gment of the Court of Appeals,
reto, was filed on August 3, 1977.
Court of Appeals granted the
uance of the mandate *eo instante*,
printed in Appendix C hereto.
for reconsideration was denied
opy of this order is printed in
er of Preliminary Injunction was
ourt pursuant to the mandate of
eptember 7, 1977. A copy of this
dix E hereto.

Court is invoked under 28 U.S.C.

British American ceased all opera-
CFTC's representation during oral
l injunction would enable British
ss. Since the definition of the term
so broad, even employees' responses
nt price information would subject
inal liability.

The Questions Presented

1. May a company which is lawfully operating prior to the promulgation of a registration requirement and without any evidence of harm to the public be put out of business without a hearing?

2. In an injunctive action instituted by the CFTC is a federal court prohibited from exercising any discretion?

3. Is 7 U.S.C. §12a(2) unconstitutional?

4. Did the Second Circuit properly interpret the applicable provisions of the Commodity Futures Trading Commission Act of 1974, as amended?

Constitutional Provisions, Statutes and Regulations Involved

The constitutional provision involved is the due process clause of the Fifth Amendment to the United States Constitution. The statute giving the District Court power to issue the injunction is 7 U.S.C. §13a-1. The rule giving the District Court discretion to enter or deny the injunction is Rule 65 of the Federal Rules of Civil Procedure. The applicable statutory provisions are printed in Exhibit F hereto. The principal portions of the applicable regulations involved are printed in Appendix G hereto.

Statement of the Case

Plaintiff, the CFTC, is a newly created federal regulatory agency created by the 1974 amendments to the Commodity Exchange Act, which became effective on April 25, 1975. Petitioner, British American, was formed and com-

ity option dealer in the

ommenced operations the
to regulate commodity
n transactions except the
l rule which became effec-
. 18187 (1975). The new
n commodity options in
tions to be promulgated
and 12a(5) (Supp. V.
cement of British Amer-
unced for the first time
egulate or prohibit com-
lers, and in that connec-
ttee to study the options
regulations. The CFTC
ng consideration of reg-
n of commodity option
ase, the CFTC indicated
option dealers may be
rading advisors, 40 Fed.

as the SEC, was aware
s a commodity option
ts operations. Prior to
visited the premises of
occasions with the an-
areas of its responsi-
en though no claims of
CFTC staff they were
ata they requested, in-
of British American's
a and clearing arrange-

ments.[2] On January 21, 1976, effective February 20, 1976, the CFTC published its initial regulations with respect to commodity trading advisors, 41 Fed. Reg. 3191. However, on February 20, 1976, the CFTC published proposed rules to govern commodity transactions, including a provision that firms such as British American register in a new category "commodity option dealers". 41 Fed. Reg. 7774.

Caught between these conflicting interpretations, British American requested a conference which was held in Washington on March 3, 1976. As a result of that conference, British American agreed to register as a commodity trading advisor, reserving the right to object to this classification, and promptly filed a full and complete registration application on March 17, 1976.[3]

On April 16, 1976 the CFTC filed a Complaint and Notice to Hearing to determine whether British American's registration application should be denied, and in that connection took the position that under 7 U.S.C. §12a(2)(C) "that pending final determination registration shall not be grant-

---

[2] In that connection in December 1975 the staff made certain suggestions relating to the marketing literature utilized by British American which were voluntarily complied with by British American. Because the defendant was denied a hearing it was precluded from introducing this revised marketing literature into evidence.

[3] Because of the conflicting interpretations of the CFTC, British American reserved the right to object to the CFTC's jurisdiction over it as a commodity trading advisor. In the administrative proceeding the staff stipulated that British American was one of the first commodity option dealers to attempt to register. An analysis of the underlying legislative history of 7 U.S.C. §2 clearly shows that classifying commodity option dealers as commodity trading advisors was a stop gap measure which was a fiction. See Senate Report No. 93-1131 (1974) at page 24. The definition of commodity trading advisor was patterned after §202(a)(ii) of the Investment Advisors Act of 1940, as amended, and brokers such as British American were not intended to be covered by this definition. See S.E.C. Release No. 1A-2 October 28, 1940, 11 F.R. 10996 reported at CCH Fed. Sec. L. Rep. ¶56,156.

granted the CFTC's motion to issue the mandate *eo instante*.[5]

Reasons for Granting the Writ

Not only does this case represent a clearly unjust result, forcing British American out of business without a hearing in any forum, which is contrary to the prior decisional law of both the Supreme Court and every other case wherein a regulatory agency is seeking an injunction, but it satisfies the traditional prerequisites for granting a writ of certiorari.

1. This is the first case to be presented to the Supreme Court of the United States with respect to the constitutionality of a new statute which will have an immediate and substantial impact on all individuals and firms involved in the commodities industry.[6]

2. The Second Circuit's position denying the right of a defendant in an injunctive action to introduce any evidence

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[5] Petitioner's motion for a stay of the mandate to the Supreme Court was denied by Justice Blackmun on August 30, 1977. The injunction was entered by the District Court on September 7, 1977, and immediately upon its service, British American ceased all operations other than the transferring out of customer accounts to other brokers pursuant to the customer's request or closing out unsolicited orders for the exercise of options previously sold. On September 23, 1977, British American sold all of its assets relating to its business as a commodity options dealer to First Regal Commodities, Incorporated a registered futures commission merchant.

[6] In litigation relating to new regulations published by the CFTC in November, 1976, a somewhat similar registration provision was before the Court and in contesting British American's petition for a writ of certiorari (No. 77-96) the CFTC took the position that with respect to the registration requirements the Supreme Court should wait for a particular case, then before the Second Circuit, to come before it. The Supreme Court denied certiorari in No. 77-96. Now the CFTC has its actual case or controversy questioning one of its registration regulations and statutory construction.

conflicts with the prior decisions of this Court, the Fifth Circuit and the due process clause of the Fifth Amendment.

3. If permitted to stand the opinion of the Second Circuit will permit a federal regulatory agency, and in particular the CFTC, to summarily deny a license to a company which was lawfully in existence prior to the imposition of a registration requirement without any showing that it is in the public interest and without any evidence that continuation of the petitioner's business harms the public. The decision also conflicts with Section 9 of the Administrative Procedure Act and *Pan-Atlantic Steamship Corp.* v. *Atlantic Coast Line Ry. Co.*, 353 U.S. 436 (1957).

4. The Second Circuit's decision deprives a federal district court in an injunctive action instituted by a federal regulatory agency from exercising its equitable discretion in contravention of Rule 65 of the Federal Rules of Civil Procedure and prior case law.

5. The decision of the Second Circuit is unjust and inequitable.

I.

The Defendant Has the Right to be Heard.

At the conclusion of the plaintiff's case, and prior to the presentation of any evidence by British American, the District Court granted British American's motion to deny the preliminary injunction. By reversing with a mandate directing the District Court to issue the preliminary injunction the defendant was deprived of the right to present evidence in the evidentiary hearing contrary to prior decisional law in the lower courts. *S.E.C.* v. *Management Dynamics, Inc.*, 515 F.2d 801 (2nd Cir. 1975); *S.E.C.* v.

Spectrum Ltd., 489 F. 2d 585 (2d Cir. 1973); *S.E.C.* v. *National Student Marketing*, 502 F. Supp. 641 (D.C. D.C. 1975); *S.E.C.* v. *Charles A. Morris Associates*, 72-73 CCH Fed. Sec. L. Rep. ¶93,756 (W.D. Tenn. 1973). It is axiomatic that if only one party is given the opportunity to present evidence at a hearing, the opposing party has not had his day in Court and is effectively denied a hearing. The Supreme Court has never ruled on this issue with respect to an injunction sought by a federal agency and should rectify this unjust result which has a direct impact on all companies and individuals subject to the jurisdiction of federal regulatory agencies.

If the District Court erred, its error was in not completing the hearing. British American should not be deprived of its day in court solely on the basis that it was diligent below and successful in prevailing at the close of the CFTC's case. At the time the Second Circuit rendered its decision, British American had not even had its day in court in the administrative forum although over 16 months had elapsed.[7] Even the Second Circuit recognized the injustice inherent in the statute and the CFTC's dilatory tactics but took the position that it was not the function of the federal courts to remedy this unfortunate situation. Appendix B at page 38a.

The decision of the Second Circuit overrules the well settled principle that when a matter is dismissed at the close of a plaintiff's case and the dismissal is reversed, the case must be remanded to give the defendant the right to present his case. *United States* v. *U.S. Gypsum Co.*, 333

[7] Subsequent to the issuance of the mandate directing the District Court to enter the preliminary injunction which had the effect of putting British American out of business the CFTC reopened the evidentiary record in the administrative hearing on its own motion. All delays in the administrative proceedings were due to the actions of the staff or the Commission.

U.S. 364 (1948); *White* v. *Rimrock Tidelands, Inc.*, 414 F. 2d 1336 (5th Cir. 1969); *Riegel Fiber Corp.* v. *Anderson Gin Co.*, 512 F. 2d 784 (5th Cir. 1975). Also see *Gulbenkian* v. *Gulbenkian*, 147 F. 2d 173 (2nd Cir. 1945). By denying British American its constitutional right to put in its case, the Second Circuit not only precluded the District Court from exercising its equitable discretion but its precipitous action resulted in an incomplete record, which it is submitted led to an unjust result based on unsupportable factual assumptions contrary to the applicable rules and regulations.

It is a dangerous precedent in our system of checks and balances to transform the federal courts into mere rubber stamps for agency allegations, as to which the regulated party has not had the opportunity to present any evidence in either the federal courts or the administrative forum. The CFTC's power to immediately deny, suspend or revoke a license, without any hearing and then control the pace of the hearings (here almost 2 years) makes the review of any final administrative order an exercise in futility and the initial determination to deny a license pending a hearing, in fact, irreversible. Under such circumstances to preclude British American the right to have its day in Court *and* to deprive the District Court from exercising its equitable discretion is clearly intolerable to the basic concepts of a democratic society.

II.

7 U.S.C. §12a(2) is Unconstitutional.

The Second Circuit completely overlooked the crucial fact that at the time British American commenced operations as a commodity option dealer there was *no requirement* for it to register in any capacity with the CFTC. Thus, prior to the time it filed its registration application it was lawfully in operation[8] as the CFTC's rules and regulations then in effect permitted the operations of a commodity option dealer without any license. This regulatory vacuum was created by the CFTC and was specifically contemplated by Congress, 7 U.S.C. §6c. Since British American clearly comes within the four standards enunciated by the Supreme Court in *Pan-Atlantic Steamships Corp.* v. *Atlantic Coast Line Ry. Co., supra,* to bring it under the protection of 5 U.S.C. §558(c) once it promptly filed for its application for registration in accordance with the newly imposed registration requirements it was clearly unlawful for the CFTC to summarily deny this license and require British American to cease all operations as a condition to granting its registration. This is the ultimate Catch 22.

As discussed above, the CFTC's power to immediately deny, suspend or revoke a license and then control the pace of the hearings, to determine fitness, so that the final administrative ruling was issued after British American had been as a practical matter, permanently put out of business makes a review of the final administrative order

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[8] The Second Circuit's assumption that British operated secretly without the knowledge of the CFTC which first learned of its activities on March 3, 1976 (Appendix B at page 30a) is totally incorrect. On November 24, 1976, more than 13 months after British American commenced operations the CFTC for the first time published a regulation, effective January 17, 1977 requiring commodity option dealers such as British American to register as futures commission merchants *not* as commodity trading advisors.

appellate court an exercise in futility, rendering the unsupported determination, to deny the license ap- on pending a hearing irreversible. When confronted n almost identical statute [§8022, N.Y. State Un- idated Laws] and the summary suspension of a g horse trainer, without a hearing, a three judge et Court panel on August 18, 1977 held that statute stitutional. *Barchi* v. *Sarafan*, 436 F. Supp. 775 .Y. 1977). Under both §8022 and 7 U.S.C. §12a(2) ency has no discretion to stay the harsh provisions statute pending a hearing.

ke the corollary Securities Exchange Act registra- rovisions [e.g., 15 U.S.C. §78o] 7 U.S.C. 12a(2) ns no time limitations within which the CFTC must s pointed out by the District Court in October 1976 ndix A at page 22a) the CFTC's delays may violate rocess. Notwithstanding this direction to promptly d the CFTC wasted over one more year and rendered ision only after British American was put out of ss. If 16 days to render a decision after a hearing *rchi* is considered intolerable surely 20 months and fter British American has been put out of business r is unconscionable.

Second Circuit erroneously presupposed that British can commenced operations after the registration re- ents became effective (Appendix B at p. 30a) while ussed above at the time British American commenced ions in early October 1975 the CFTC had not defin- asserted jurisdiction over commodity option dealers mplified by the conceded fact that British American e of the first option dealers to submit an application gistration.

the CFTC's interpretation, as affirmed by the Sec- ircuit, that under 7 U.S.C. §12a(2), the CFTC has

only two choices, to grant or deny an application for registration, and if the latter choice is adopted the only avenue open to an existing dealer is to shut its doors regardless of the merits of any charges against him until an administrative hearing is completed at such time as the CFTC elects. It was precisely this type of inflexibility which the Court found, among other things, unconstitutional in *Barchi* v. *Sarafan, supra.*[9]

The inequity and injustice is apparent in this case since at the time of the filing of the administrative complaint against British American, the CFTC had no evidence whatsoever to support the fraud allegation contained therein. The staff having obtained customers' lists on the pretext of conducting a preregistration audit then embarked, *after* the issuance of the complaint, on an active and vigorous complaint solicitation program, in some instances using false names and addresses and other questionable entrapment techniques in an attempt to obtain evidence to support its allegations in the administrative complaint.[10]

Three months later when the instant injunctive proceeding was initiated the CFTC still lacked evidence of fraud.

Three months thereafter in the hearing on the preliminary injunction the CFTC failed to prove fraud or that John Forma's prior injunctions, on consent without admitting or denying any allegations, under the federal secur-

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[9] On November 10, 1977 the CFTC in its brief to the Second Circuit in the case entitled *Lloyd, Carr & Co. et al.* v. *CFTC* (Docket No. 77-4146) conceded at page 44 that under 7 U.S.C. §12a(2) it is required to either register the firm or to deny the application.

[10] When the CFTC persisted in this tactic British American was required to institute an injunctive action in the United States District Court for the Southern District of New York (76 Civ 1984). The CFTC subsequently advised the Court that it had contacted over 50 persons from such data and would not contact any more customers without first advising the Court. Recently, these tactics of the CFTC were severely criticized in *CFTC* v. *Rosenthal & Co.*, 74 FRD 454 (N.D. Ill. E.D. 1977).

ating to net capital and bookkeeping, which
nrelated to any commodity trading advisor
vas in any way related to British American
ions in the administrative complaint. At the
ober 1976, the CFTC being unable to produce
witnesses, relied, albeit unsuccessfully, on
of staff employees who, using fictitious names
ent techniques, had posed as prospective

r 1976, eight months after filing the com-
formed the basis for the CFTC position that
can should be denied the right to continue
the CFTC at the close of the administrative
fitness of British American to be registered
ty trading advisor, feeling insecure in the
nted on the issue of fraud, moved to reopen
present additional customer testimony which
the Administrative Law Judge. The CFTC
reopened the hearing by consolidating that
h a proceeding newly instituted in January
nine British American's fitness to be regis-
res commission merchant and 24 hours prior
hearing, without notice to British American
directed the Administrative Law Judge to
on the fraud allegations without ever filing
mplaint in that "second" proceeding.

nas accordingly and demonstrably stretched
tive process to the breaking point in order
a vain attempt to find supporting evidence
nt already filed and has used 7 U.S.C.
erpreted by the Second Circuit to prevent
and without a hearing an applicant such as
an from continuing to earn a livelihood in
of every known concept of due process and

III.

The Second Circuit Misinterpreted the Applicable Statutory Provisions.

The interpretation of these statutory provisions to an actual case or controversy is a question of first impression. It is respectfully submitted that the District Court's well reasoned interpretation of the statutory scheme and its right to exercise its equitable discretion is legally correct. Its decision, annexed hereto as Appendix A and the Second Circuit's decision, annexed hereto as Appendix B speak for themselves. However, in this connection it is important to note that the Commodity Exchange Act, as amended, and the regulations promulgated thereunder clearly provide that the anti-fraud, disclosure, inspection rights, bookkeeping requirements, etc., are applicable to all persons and firms *whether or not registered* with the CFTC. See 40 Fed. Reg. 26504 (June 24, 1975), 41 Fed. Reg. 51808 (November 24, 1976). Accordingly, British American has at all times been subject to all of the weapons in the CFTC's regulatory arsenal. In addition, the Second Circuit's imprimatur of the CFTC's interpretation of the term "other good cause shown" to be a general catch-all, especially when it is the basis for the denial of a license without a hearing, is legally unsupportable and manifestly unjust. As a matter of accepted statutory construction the term "other good cause shown" encompasses causes similar to the other causes specifically set forth in the statute [7 U.S.C. §12a(2)(b)(ii)]. *Pulvers* v. *Commissioner of Internal Revenue*, 407 F.2d 838 (9th Cir. 1969); *Flying Tiger Line* v. *C.A.B.*, 204 F.2d 404 (D.C. Cir. 1953); *U.S. Gypsum Co.* v. *Mystic River Bridge Authority*, 329 Mass. 130, 106 N.E. 2d 677 (1952). On its face the consent injunctions of Mr. Forma before another federal agency relating to al-

ookkeeping and net capital require-
ny similarity to the other causes
12a(2)(b)(i). The subsequent use of
ns in another industry to deny the
on of British American without a
ative of the due process clause. See
2d 59 (5th Cir. 1970), *cert. den. sub*
3 U.S. 904 (1971).

CONCLUSION

oing, the undersigned on behalf of
tfully requests that certiorari be

Respectfully submitted,

CHARLES J. HECHT
Attorney for Petitioner
Suite 1760
60 East 42nd Street
New York, New York 10017
(212) 490-3232

ENDIX

Appendix A

(Opinion of District Court)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

76 Civ. 3247

COMMODITY FUTURES TRADING COMMISSION,

Plaintiff,

—against—

BRITISH AMERICAN COMMODITY OPTIONS CORP.,

Defendant.

APPEARANCES:

CHARLES HARRIS, ESQ.
LESLIE BLAU, ESQ.
Attorneys for Plaintiff
Commodity Futures Trading Commission
61 Broadway
New York, New York 10006

CHARLES HECHT, ESQ.
Attorney for Defendant
60 East 42nd Street
New York, New York 10017

GAGLIARDI, *D. J.*

Plaintiff Commodity Futures Trading Commission ("CFTC") moves by order to show cause for a preliminary injunction, pursuant to Rule 65, Fed. R. Civ. P., to enjoin

Act, 7 U.S.C. §2,[2] and therefore was required to register with the CFTC under Section 4m of the Act, *supra*. This evidence was adduced through eight witnesses whose testimony was limited solely to showing that employees of British American gave advice over the phone on commodity options as an investment vehicle and mailed explanatory pamphlets to customers and potential customers.

The only other relevant testimony introduced at the hearing, in the form of exhibits, was the "commodity trading advisor" registration application of British American filed in March 1976 and other exhibits relating to the status of the administrative law proceeding.

The CFTC has brought this preliminary injunction motion pursuant to the authority granted in Section 6c of the Act, 7 U.S.C. §13a-1, which provides that:

> Whenever it shall appear to the [CFTC] that any . . . person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of this chapter or any rule,

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[2] 7 U.S.C. § 2—

. . . The term "commodity trading advisor" shall mean any person who, for compensation or profit, engages in the business of advising others, either directly or through publications or writings, as to the value of commodities or as to the advisability of trading in any commodity for future delivery on or subject to the rules of any contract market, or who for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning commodities; but does not include (i) any bank or trust company, (ii) any newspaper reporter, newspaper columnist, newspaper editor, lawyer, accountant, or teacher, (iii) any floor broker or futures commission merchant, (iv) the publisher of any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation including their employees, (v) any contract market, and (vi) such other persons not within the intent of this definition as the Commission may specify by rule, regulation, or order:

> regulation, or order thereunder, . . . the [CFTC] may bring an action in the proper district court of the United States . . . to enjoin such act or practice, or to enforce compliance with this chapter, or any rule, regulation or order thereunder . . . . Upon a proper showing, a permanent or temporary injunction . . . shall be granted without bond.

In all material respects this provision is identical to the injunctive provision in the Securities Act of 1933, §20(b), 15 U.S.C. §77t(b) and in the Securities Exchange Act of 1934, §21(e), 15 U.S.C. §78u(e). Accordingly, case law developed under the injunctive provisions of the securities laws is pertinent to the case at bar. *CFTC* v. *J.S. Love & Associates Options, Ltd.*, ¶20,198, CCH Comm. Fut. L. Rptr. at 21,106-07 (S.D.N.Y. 1976).

CFTC enforcement actions seeking injunctive relief, like Securities and Exchange Commission ("SEC") actions, are not governed by the criteria that apply in private injunction suits. *SEC* v. *Management Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975). Proof of irreparable injury or the inadequacy of other remedies as in a private injunction suit is not required. *Id.;* III L. Loss, Securities Regulation 1979 (1961, Supp. 1969). However, the issuance of an injunction is always subject to the principles of equitable discretion. *Hecht Co.* v. *Bowles,* 321 U.S. 321, 328-30 (1944); *SEC* v. *Texas Gulf Sulphur,* 312 F. Supp. 77, 87 (S.D.N.Y. 1970), *aff'd in part and rev'd in part,* 446 F.2d 1301 (2d Cir.), *cert. denied,* 404 U.S. 1005 (1971). Section 6c of the Act requires that "a proper showing" be made before a preliminary injunction "shall be granted". Such language affords no sufficient basis for concluding that Congress meant special weight to be given the CFTC's

decision to institute suit. *See SEC* v. *Frank,* 388 F.2d 486, 491 (2d Cir. 1968). As stated by the Second Circuit Court of Appeals in *SEC* v. *Management Dynamics,* 515 F.2d at 808 (citations omitted):

> We scarcely mean to imply that judges are free to set to one side all notions of fairness because it is the SEC, rather than a private litigant, which has stepped into court. . . . "[I]n deciding whether to grant injunctive relief, a district court is called upon to assess all those considerations of fairness that have been the traditional concern of equity courts." *See CFTC* v. *J.S. Love Assoc., supra* at 21,107.

If Congress had intended that the courts refrain from exercising their sound discretion in equity jurisdiction, it would have had to say so in unequivocal language in the Act. *See Hecht Co.* v. *Bowles, supra* at 327-29; *SEC* v. *Frank, supra* at 491. In deciding whether to grant a preliminary injunction in this case:

> The only question presented at this stage of the proceedings, namely an application for a preliminary injunction in advance of a trial upon the merits, [before the administrative law judge] is whether a violation . . . has been so clearly established that defendants are, in effect, to be found at fault without awaiting the development of all the facts upon a trial. *SEC* v. *Capital Gains Research Bureau, Inc.,* 306 F.2d 606, 608 (2d Cir. 1962) (en banc), *rev'd on other grounds,* 375 U.S. 180, 84 S. Ct. 275, 11 L.Ed.2d 237 (1963); *see SEC* v. *Management Dynamics, supra* at 807 n. 1.

While the facts presented at the hearing in this case indicate, for the limited purpose of this preliminary in-

junction motion, that British American qualifies as a "commodity trading advisor",[3] this conclusion alone is not enough to grant CFTC's preliminary injunction. Under Section 4m of the Act, if British American is a "commodity trading advisor" it must register with the CFTC to do business. However, British American did file a registration application in March 1976. CFTC asserts that it rejected British American's application on April 16, 1976; that Section 4m of the Act prohibits doing business while unregistered; and that, therefore, this court must grant a preliminary injunction prohibiting British American from doing business.

CFTC's argument ignores the equity discretion of this court, and its logic falls upon a closer examination of the Act and CFTC's actions against British American. The Act generally provides for automatic registration of applicants with the CFTC upon the expiration of a thirty-day period after an application is filed. Section 4n(2) of the Act, 7 U.S.C. §6n(2);[4] *see* Appendix A at 5. Even in those situations where the CFTC decides that registration should be denied, in almost all cases such denial can only come after an opportunity for a hearing. *See* Section 4(n)7 and

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[3] British American contests that it is a "commodity trading advisor" and filed its registration application without conceding that the CFTC had jurisdiction over its activities. *See* Appendix A at 2. This issue must be finally determined in the administrative proceeding and the finding in the case at bar in no way prejudges the merits of British American's claim.

[4] 7 U.S.C. § 6n—

(2) Except as hereinafter provided, such registration shall become effective thirty days after the receipt of such application by the Commission, or within such shorter period of time as the Commission may determine.

8a(2) of the Act, 7 U.S.C. §§ 6(n)(7)[5] & 12a(2).[6] In one situation, where a person is subject to an outstanding

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[5] 7 U.S.C. § 6n—

(7) The Commission after hearing may by order deny registration, revoke or suspend the registration of any commodity trading advisor or commodity pool operator if the Commission finds that such denial, revocation, or suspension is in the public interest and that—

(A) the operations of such person disrupt or tend to disrupt orderly marketing conditions, or cause or tend to cause sudden or unreasonable fluctuations or unwarranted changes in the prices of commodities;

(B) such commodity trading advisor or commodity pool operator, or any partner, officer, director, person performing similar function or controlling person thereof—

(i) has within ten years of the issuance of such order been convicted of any felony or misdemeanor involving the purchase or sale of any commodity or security, or arising out of any conduct or practice of such commodity trading advisor or commodity pool operator or affiliated person as a commodity trading advisor or commodity pool operator; or

(ii) at the time of the issuance of such order, is permanently or temporarily enjoined by order, judgment or decree of any court of competent jurisdiction from acting as a commodity trading advisor, commodity pool operator, futures commission merchant, or floor broker, or as an affiliated person or employee of any of the foregoing, or from engaging in or continuing any conduct or practice in connection with any such activity or in connection with the purchase or sale of commodities or securities; or

[6] 7 U.S.C. § 12a—

Registration of commission merchants and brokers; fees; rules and regulations; publication of harmful acts; disapproval of by-laws, etc.

The Commission is authorized—

(2) to refuse to register any person—

(A) if the prior registration of such person has been suspended (and the period of such suspension shall not have expired) or has been revoked;

(B) if it is found, after opportunity for hearing, that the applicant is unfit to engage in the business for which the

ler under the Act denying trading privileges or re- ing registration, registration can be denied without r providing for a hearing. Section 4n(6) of the Act, J.S.C. §6n(6).[7] Finally, under three special situations, Act allows regisration to be denied prior to a final ermination in the administrative proceeding.[8] Section 2)(C), *supra* ("Provided, That pending final determi- ion under clause (B) or (C), registration shall not be

application for registration is made, (i) because such applicant, or, if the applicant is a partnership, any general partner, or, if the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, at any time engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal court, or was debarred by any agency of the United States from contracting with the United States, or the applicant willfully made any material false or misleading statement in his application or willfully omitted to state any material fact in connection with the application, or (ii) for other good cause shown; or

(C) in the case of an applicant for registration as futures commission merchant, if it is found after opportunity for hearing that the applicant has not established that he meets the minimum financial requirements under section 6f of this title: *Provided*, That pending final determination under clause (B) or (C), registration shall not be granted; *And provided further*, That the applicant may appeal from a refusal of registration under clause (B) (C) in the manner provided in section 9 of this title; and

U.S.C. § 6n—

(6) The Commission is authorized, without hearing, to deny egistration to any person as a commodity trading advisor or ommodity pool operator if such person is subject to an outtanding order under this chapter denying to such person rading privileges on any contract market, or suspending or evoking the registration of such person as a commodity tradng advisor, commodity pool operator, futures commission nerchant, or floor broker, or suspending or expelling such erson from membership on any contract market.

ection 8a(2) of the Act may also in certain instances be violaf constitutional due process. Appendix A at 6 n.6.

granted"); *see* Appendix A at 6-7. The first two special situations, conceded by the CFTC not to be at issue in the case at bar, are when minimum financial requirements are not met, Section 8a(2)(C) of the Act, *supra*, and when a person with certain specified interests in the registering corporation has been convicted of a felony or has committed other specified acts. Section 8a(2)(B)(i) of the Act, *supra*.

CFTC assertedly denied British American's registration and brings this preliminary injunction action pursuant to the third special situation, Section 8a(2)(B)(ii) of the Act:

> The [CFTC] is authorized . . . to refuse to register any person . . . if it is found, after opportunity for hearing, that the applicant is unfit to engage in the business for which the application for registration is made . . . (ii) for other good cause shown. *See* Appendix A at 6.

CFTC asserts that because it found "other good cause" and denied British American's registration, this court must grant a preliminary injunction denying Britsh American the opportunity to do business pending the final determination of the administrative hearing on whether British American is fit to be registered as a "commodity trading advisor".

Such an automatic result is contrary to the equity discretion of this court and is too harsh a result for British American. At the hearing before this court CFTC offered no evidence to support its finding of "good cause shown" and no evidence as to why the public interest requires prohibiting British American from doing business pending the final determination of the administrative proceeding. CFTC did not allege nor offer any proof that British American

or misled its customers or in any way con-
usiness illegally or unethically.
indication in the record of CFTC's reasons for
tish American's registration are two outstand-
decrees with the SEC against the principal
itish American, John Forma.[9] No background
to the entering of these decrees nor any evi-
t illegal behavior of John Forma were offered.
ourt expresses no opinion as to whether these
ees are grounds for a final determination of
e registered, these bare consent decrees, with-
cation of unfair dealing by British American,
titute a "proper showing" for a preliminary
ior to the final determination of the adminis-
eding.
C cites a July 1975 release of "Standards of
egistration" to support its position that an
decree is a criterion included in "for other
hown" under Section 8a(2)(B)(ii) of the Act.
28125 (July 3, 1975). The release, however,
s that registration can be denied "for other
hown" "after opportunity for hearing" (em-
).[10] This failure to indicate that "good cause

Judgment of Permanent Injunction in 70 Civ. 1743
consents of John Forma and John Forma Securi-

udgment of Permanent Injunction in 73 Civ. 643
consents of John Forma and Forma Securities, Inc.

andards for Denial of Registration", 40 Fed. Reg.

ver, other provisions in section 8a(2) are not so
h as the authority *after opportunity for hearing*
istration for having engaged in a practice of the
rohibited by the Act. In addition, the Commission
d, *after opportunity for hearing*, to deny registra-

shown" is a grounds for a pre-hearing denial of registration gave British American no notice that by their going into business and applying for registration as "commodity trading advisors" they could not take advantage of automatic registered status at least until an opportunity for a hearing. In an act that generally provides for automatic registration or at least requires a hearing prior to denial of registration, routine pre-hearing injunctions resulting from an expansive use of "other good cause shown" would undercut the intent of the Act.

The CFTC's position that this court must grant a preliminary injunction once CFTC has met its burden of showing British American is a "commodity trading advisor" ignores this court's discretion in equity jurisdiction. *See Hecht Co.* v. *Bowles, supra* at 327-30; *SEC* v. *Management Dynamics, supra* at 807-09. A critical question in granting an injunction is whether "there is a reasonable likelihood that the wrong will be repeated." *SEC* v. *Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1100 (2d Cir. 1972); *see SEC* v. *Management Dynamics, supra* at 807. Here the

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tion if "for other good cause shown", the applicant is unfit to engage in the business for which he has made application for registration. These criteria are not specific and need Commission interpretation. The Commission has interpreted "for other good cause shown" to include the following:

• • •

(ii) At the time of the application is permanently or temporarily enjoined by order, judgment or decree of any court of competent jurisdiction, or by agreement or settlement to which the Commission or the *Securities and Exchange Commission* is a party from acting as a commodity trading advisor.

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This interpretation regarding "for other good cause shown" is not exclusive; i.e., there may be other instances for which the Commission, *after opportunity for hearing*, may determine to deny registration. (emphasis added)

f business after the CFTC has found
ny registration is not the necessary
ng to grant an injunction. Rather,
ndication that a wrong connected with
herein related to the alleged activity
onsent decree, is to be repeated. The
evidence of any illegal behavior of
leading up to the consent decree or
h American. Absent such repetition,
ion cannot be granted under the facts

discretion in deciding upon the re-
injunction must balance the public in-
rivate interest of British American.
he formulation of its discretion [the
hat the public interest, when in con-
terest, is paramount." *SEC* v. *Cul-*
250 (2d Cir. 1959); *see SEC* v. *Man-*
upra at 809 n. 5. However, "[t]he
injunction upon defendants is, of
be considered." *SEC* v. *Broadwall*
. Supp. 962, 967 (S.D.N.Y. 1965); *see*
ustries Corp., 326 F. Supp. 943, 957
TC v. *J.S. Love & Assoc.*, *supra* at

American since October 1975 has built
proximately one hundred employees,
net worth,[11] and close to two thousand
it from doing business until a final
dministrative proceeding now set for
lministrative law judge on November

rma in Opposition to Plaintiff's Request
tion, p.2 (August 6, 1976).

15, 1976 would be too harsh a result.[12] If the administrative law judge decides after a full hearing on the merits that British American is fit to be registered, a prior preliminary injunction would in the short time prior to that final determination have irreparably injured British American's business, forcing their employees out of work. British American's customers would also be hurt. British American does not charge when a customer closes out its transaction. With British American out of business, its customers would have to pay another dealer to close out their options. If the administrative proceeding results in a final determination denying registration, the finding would put British American out of business. In the interim, British American, with no evidence that it is mistreating or misleading its customers or the general public does no apparent harm to the public interest by being allowed to do business. The purposes that would be served by issuance of a preliminary injunction are outweighed by the "harmful impact on the business reputation . . . and legitimate business activities" of British American. *SEC* v. *Harwyn Industries*, *supra* at 957; *see CFTC* v. *J.S. Love & Assoc.*, *supra* at 21, 107.

After consideration of the record, testimony at the hearing and other circumstances, the court concludes in the exercise of its discretion that a preliminary injunction against British American is unwarranted. As a result, the court grants defendant's request for a directed verdict.

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[12] The CFTC waited until July 22, 1976 to bring its preliminary injunction action. If CFTC's allegations are correct, an action could have been commenced shortly after it learned that British American had started doing business unregistered in October 1975 and before British American had developed its sales force and its clientele to its present strength. CFTC even chose to wait an additional three months after April 16, 1976, the date it acted pursuant to Section 8a(2)(B) of the Act to deny British American's application, to bring this action.

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n of District Court

indication on the merits of
fore the administrative law

e court's finding of fact and
ed by Rule 52(a) Fed. R.

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U.S.D.J.

APPENDIX A

Plaintiff Commodity Futures Trading Commission ("CFTC") moves for a preliminary injunction to enjoin defendant British American Commodity Options Corp. ("British American") from making use of the mails or any means or instrumentality of interstate commerce in violation of Section 4m of the Commodity Exchange Act, as amended ("the Act"). 7 U.S.C. Section 6m.[1] The defendant cross-moves to dismiss the action pursuant to Rule 12(b) (1), (2) and (6) Federal Rules of Civil Procedure, for lack of jurisdiction and for the failure of the complaint to state a claim upon which relief can be granted.

This court has jurisdiction under Section 6c of the Act, 7 U.S.C. Section 13a-1,[2] where the defendant transacts

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[1] 7 U.S.C.—

§ 6m. Same; use of mails or other means or instrumentalities of interstate commerce

It shall be unlawful for any commodity trading advisor or commodity pool operator, unless registered under this chapter, to make use of the mails or any means or instrumentality of interstate commerce in connection with his business as such commodity trading advisor or commodity pool operator: *Provided,* That the provisions of this section shall not apply to any commodity trading advisor who, during the course of the preceding twelve months, has not furnished commodity trading advice to more than fifteen persons and who does not hold himself out generally to the public as a commodity trading advisor.

[2] 7 U.S.C. § 13a—

1. Action to enjoin or restrain violations; compliance; writs and orders; jurisdiction and venue; process

Whenever it shall appear to the Commission that any contract market or other person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of this chapter or any rule, regulation, or order thereunder, or is restraining trading in any commodity

to the determination of the motions in this case, were stipulated to by the parties on the record or in their papers submitted to the court. These facts are set forth in chronological order. On or about March 3, 1976 the Division of Enforcement of the CFTC orally advised the defendant that it was the CFTC's position that defendant qualified as a "commodity trading advisor" under Section 2(a) of the Act, 7 U.S.C. Section 2,[3] and should register with the CFTC as required by Section 4m of the Act, *supra*. Thereafter, on March 17, 1976, British American, without conceding that the CFTC had jurisdiction over its activities, filed an application for registration on Form CFTC 5-R. The application was returned with a request for additional biographical data. The application was resubmitted on March 23, 1976. On April 16, 1976 the CFTC filed a "Complaint and Notice of Hearing pursuant to Section 4(n)7 and 8a(2) of the Commodity Exchange Act, as amended."

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[3] 7 U.S.C. § 2—

> . . . The term "commodity trading advisor" shall mean any person who, for compensation or profit, engages in the business of advising others, either directly or through publications or writings, as to the value of commodities or as to the advisability of trading in any commodity for future delivery on or subject to the rules of any contract market, or who for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning commodities; but does not include (i) any bank or trust company, (ii) any newspaper reporter, newspaper columnist, newspaper editor, lawyer, accountant, or teacher, (iii) any floor broker or futures commission merchant, (iv) the publisher of any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation including their employees, (v) any contract market, and (vi) such other persons not within the intent of this definition as the Commission may specify by rule, regulation, or order:

7 U.S.C. Sections 6(n)[7] and 12a(2).[8] The Complaint al-

[7] 7 U.S.C. § 6n—

(7) The Commission after hearing may by order deny registration, revoke or suspend the registration of any commodity trading advisor or commodity pool operator if the Commission finds that such denial, revocation, or suspension is in the public interest and that—

(A) the operations of such person disrupt or tend to disrupt orderly marketing conditions, or cause or tend to cause sudden or unreasonable fluctuations or unwarranted changes in the prices of commodities;

(B) such commodity trading advisor or commodity pool operator, or any partner, officer, director, person performing similar function or controlling person thereof—

(i) has within ten years of the issuance of such order been convicted of any felony or misdemeanor involving the purchase or sale of any commodity or security, or arising out of any conduct or practice of such commodity trading advisor or commodity pool operator or affiliated person as a commodity trading advisor or commodity pool operator; or

(ii) at the time of the issuance of such order, is permanently or temporarily enjoined by order, judgment or decree of any court of competent jurisdiction from acting as a commodity trading advisor, commodity pool operator, futures commission merchant, or floor broker, or as an affiliated person or employee of any of the foregoing, or from engaging in or continuing any conduct or practice in connection with any such activity or in connection with the purchase or sale of commodities or securities; or

[8] 7 U.S.C. § 12a—

Registration of commission merchants and brokers; fees; rules and regulations; publication of harmful acts; disapproval of by-laws, etc.

The Commission is authorized—

• • •

(2) to refuse to register any person—

(A) if the prior registration of such person has been suspended (and the period of such suspension shall not have expired) or has been revoked;

(B) if it is found, after opportunity for hearing, that the applicant is unfit to engage in the business for which the application for registration is made, (i) because such applicant, or, if the applicant is a partnership, any general partner, or, if the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, at any time engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal court, or was debarred by any agency of the United States from contracting with the United States, or the applicant willfully made any material false or misleading statement in his application or willfully omitted to state any material fact in connection with the application, or (ii) for other good cause shown; or

leged that the defendant is unfit to be registered as a commodity trading advisor. The final determination of this question was referred to an administrative law judge and a prehearing conference is scheduled to take place before Administrative Law Judge Hunt on October 8, 1976. The CFTC in the Complaint stated that it deemed it appropriate not to grant registration to the defendant pending final determination of the administrative hearing. The instant claim was instituted here in this court by order to show cause on July 22, 1976.

At the outset, the defendant British American's motions to dismiss the CFTC's action must be denied in all respects. The doctrine of primary jurisdiction has no application to this motion for a preliminary injunction. The pendency of an administrative proceeding is irrelevant. CFTC specifically seeks to enjoin the defendant from doing business pending the final determination of the administrative proceeding. Section 6c of the Act, *supra,* allows the CFTC to bring such an action in federal court and the specific language of the Act, as described in detail below, allows the CFTC to act before the administrative proceeding is completed. See Section 8a(2)(B) and (C) of the Act, *supra.* As set forth below, until British American is registered it is prohibited by the Act from doing

business as a commodity trading advisor. Because of the CFTC's action under Section 8a(2) of the Act, British American cannot be registered unless and until after a hearing its fitness to be registered is determined. This action only seeks to preliminarily enjoin the defendant until there is a final determination in that hearing. If it is in the public interest to stop British American from doing business, CFTC need not wait, while the unregistered defendant makes unauthorized transactions, until the administrative hearing is complete. As such, on the face of its complaint, the CFTC has stated a cause of action.

The Commodity Futures Trading Commission Act of 1974 authorizes the CFTC to seek injunctive relief in the appropriate United States District Court to enjoin violations of provisions of and rules promulgated under the Act and to enforce compliance with the Act. Section 6c of the Act, *supra.* This court, before it can grant the requested preliminary injunction, must first review the CFTC's actions to determine whether they comply with the requirements of the Act. If the court finds that the CFTC's actions are in compliance with the Act, it must then, in accordance with the standards established in this Circuit, set the matter down for an evidentiary hearing, as it is doing today, to independently judge the need for a preliminary injunction. And the appropriate citations are: *SEC* v. *Management Dynamics,* 515 F.2d 801, pages 806 and 807; *SEC* v. *Frank,* 388 F.2d 486, at pages 491-92; and *CFTC* v. *J.S. Love & Associates,* 76 Civ. 928, in the Southern District of New York, this year.

The court must first examine the statutory language and relevant legislative history and CFTC rules and regulations. Section 4n(2) of the Act, 7 U.S.C. Section 6n(2), is the starting point of an examination of CFTC's claim

that British American is not registered. That section provides as follows:

> "Except as hereinafter provided, such registration shall become effective thirty days after the receipt of such application by the Commission, or within such shorter period of time as the Commission may determine."

This automatic registration provision is not affected where the CFTC, in accordance with the "as hereinafter provided" language acts within thirty days. In this case a question has arisen as to whether the registration period began on March 17 or March 23, 1976, which is the date of the amended application. Even with the first date applicable, the CFTC's actions on April 16, 1976 are within the required thirty-day period. Under the CFTC Rules of Practice Chap. 1 Section 10.5, the date of filing is not included in the computation of time. 41 Federal Register 2512, filed on January 16, 1976.

Consequently, the CFTC action is within the thirty days to prevent the automatic registration under Section 4n(2) of the Act.

A careful examination of the statute shows that CFTC's actions on April 16, 1976 satisfy the "as hereinafter provided" exception to 4n(2). First, while the Act is unclear as to whether the "as hereinafter provided" language applies only to Section 4n or to the entire Act, the legislative history makes it clear that the language means "as provided elsewhere in the Act." Senate Report No. 93-1131, 93rd Cong. 2d Sess. Section by Section Analysis, Section 205 (1974).

The CFTC therefore properly alleges that it is acting

to Section 8a(2) of the Act, *supra*. Specifically, ection 8a(2) (B)(ii) of the Act, the CFTC is:

]uthorized to refuse to register any person . . . is found after opportunity for hearing, that the icant is unfit to engage in the business for which application for registration is made, . . . (ii) for good cause shown.

is language appears to require a hearing prior nial of registration, Section 8a(2)(C) of the Act ly states: "Provided, That pending final deter- under clause (B) or (C), registration shall not d." The initial decision not to grant registration ade by the CFTC prior to any hearing being This clear meaning of the Act is reinforced in ative history, which states:

determining whether to register an applicant for l period, the Commission may refuse to grant registration for any of the reasons specified in on 8a(2) of the Commodity Exchange Act, as

tutory language covering the requirement and timing ng under the Commodity Exchange Act, as amended, erent from the more specific language in other regula- For example, Section 11 of the Securities Exchange Act, l, 15 U.S.C. § 78o (1975), specifically requires that a hearing for brokers and dealers be held and concluded days of the date of filing the application for registration ended up to 90 additional days for good cause). 15 o(b)(1)(B). While the CFTC's failure to hold a timely not a violation of the Commodities Exchange Act, it e instances be violative of constitutional due process. notes, however, that in this case to date there have reasonable delays in the holding of the hearing and itish American has been allowed to trade while not there could in any case be no prejudice due to post- in the hearing.

amended, and the Commission may do so "pending final determination" as provided in that section. Senate Report No. 94-73, 94th Cong. 1st Sess. 5 (1975).

Once CFTC determined that British American is a "commodity trading advisor" and denied its application for registration for what it determined to be "good cause shown," CFTC could properly allege that British American's use of the mails or any means or instrumentality of interstate commerce in connection with its business as a commodity trading advisor was in violation of Section 4m of the Act, *supra*. The CFTC could properly bring an injunctive proceeding in this court to restrain such use of the mails or interstate commerce pending a final determination of the administrative proceeding. Section 6c of the Act, 7 U.S.C. Section 13a-1. This court must determine if there are proper grounds for granting a preliminary injunction in this case and accordingly is prepared to proceed with the evidentiary hearing.

It is so ordered.

Appendix B

nion of Court of Appeals)

STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

041—September Term, 1976.

1977 Decided August 3, 1977.)

Docket No. 77-6002

Y FUTURES TRADING COMMISSION,

Plaintiff-Appellant,

v.

ERICAN COMMODITY OPTIONS CORP.,

Defendant-Appellee.

D and TIMBERS, *Circuit Judges*
IACMAHON,* *District Judge.*

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ommodity Futures Trading Commission
tered in the Southern District of New
liardi, *District Judge*, 422 F. Supp. 662
denying the Commission's motion for a
tion enjoining defendant-appellee from

District of New York, sitting by designation.

using the mails or any instrumentality of interstate commerce in connection with its business as a commodity trading advisor unless registered with the Commission, as required by the Commodity Exchange Act, 7 U.S.C. §6m.

Reversed and remanded with instructions to issue the preliminary injunction.

RICHARD N. NATHAN, Acting General Counsel, Commodity Futures Trading Commission, Wash., D.C. (Frederick T. Spindel, Assoc. General Counsel, Richard A. Graham, Special Counsel, and Virginia F. Crisman, Atty., Commodity Futures Trading Commission, Wash., D.C.), *for Plaintiff-Appellant.*

CHARLES J. HECHT, New York, N.Y. (Haig Costikyan, of counsel), *for Defendant-Appellee.*

MACMAHON, *District Judge:*

Appellant, Commodity Futures Trading Commission ("the Commission"), appeals from an order of the United States District Court for the Southern District of New York (Gagliardi, *J.*), denying a preliminary injunction in an action brought by the Commission pursuant to Section 6c of the Commodity Exchange Act, as amended ("the Act"), 7 U.S.C. § 13a-1 (Supp. V, 1975). The Commission sought to prohibit appellee, British American Commodity Options Corp. ("British American") from making use of the mails or any instrumentality of interstate commerce

business as a commodity trading
egistered, in violation of 7 U.S.C.
remand with direction to issue a

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ts' to the Act, 7 U.S.C. § 1 et seq.,
he Commodity Futures Trading
a comprehensive scheme for reg-
mmodity futures. Central to this
requirement that persons actively
trading shall be registered with
n 2 defines the new category of
isors,"[3] and § 6m unequivocally

ling Commission Act of 1974, Pub. L.
citations in this opinion refer to sec-
f United States Code.

(futures commission merchants), 6e
es of futures commission merchants),
advisors and commodity pool oper-

pertinent part:

trading advisor' shall mean any per-
n or profit, engages in the business of
directly or through publications or
of commodities or as to the advisa-
commodity for future delivery on or
ny contract market, or who for com-
as part of a regular business, issues
or reports concerning commodities;
any bank or trust company, (ii) any
spaper columnist, newspaper editor,
acher, (iii) any floor broker or fu-
t, (iv) the publisher of any bona fide
e, or business or financial publication
irculation including their employees,
t, and (vi) such other persons not
definition as the Commission may

makes it "unlawful for any commodity trading advisor . . . unless registered [with the Commission] to make use of the mails or any means or instrumentality of interstate commerce in connection with his business as such commodity trading advisor. . . ." 7 U.S.C. § 6m.

Commodity trading advisors seeking registration must furnish the Commission with information concerning its organizational and capital structure, biographical information concerning its key personnel, information about its methods of operations and provisions for handling clients' funds and accounts, compensation data and "such other information as the Commission may require to determine whether the applicant is qualified for registration." 7 U.S.C. § 6n(1).

Applications for registration as commodity trading advisors become effective if the Commission fails to act within thirty days after receipt,[4] but the Commission may

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specify by rule, regulation or order: *Provided*, That the furnishing of such services by the foregoing persons is solely incidental to the conduct of their business or profession."

[4] 7 U.S.C. § 6(2) provides:

"Except as hereinafter provided, such registration shall become effective thirty days after the receipt of such application by the Commission, or within such shorter period of time as the Commission may determine."

While § 6n contains no provision explicitly precluding registration pending final action on a registration application (as in § 12a (a)(e), *infra*), nor is there in the Act any other provision authorizing the Commission to approve any sort of "interim" registration while administrative proceedings are pending. We can only conclude that § 6n(2) allows the Commission thirty days initially to evaluate an application for registration, and that if proceedings are initiated before that time to determine whether grounds exist for denying or refusing registration under either §§ 6n(7) or 12a (2), the applicant must remain unregistered pending final determination.

Court of Appeals

on various grounds set
(2).[5] While the Commis-

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practice of such commodity
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of any of the foregoing, or
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f such person has been sus-
suspension shall not have

sion may deny or refuse registration without a hearing in certain limited situations, see §§ 6n(6) and 12a(2)(A), in most cases the Commission must conduct a hearing before denying or refusing registration, §§ 6n(7) and 12a(2)(B) and (C). Section 12a(2)(C) further provides that "pending final determination under clause (B) or (C), *registration shall not be granted*" (emphasis added). In the case of refusal to register under subsections (B) or (C), the applicant can appeal such refusal directly to the Court of Appeals, see §§ 12a(2)(C) and 9.

Finally, the Commission is empowered in § 13a-1 to bring an action in the district court to enjoin "any act or practice constituting a violation of the Act or any rule, regulation or order under the Act." Section 13a-1 further provides that: "Upon a proper showing, a permanent or

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(B) if it is found, after opportunity for hearing, that the applicant is unfit to engage in the business for which the application for registration is made, (i) because such applicant, or, if the applicant is a partnership, any general partner, or, if the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, at any time engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal court, or was debarred by any agency of the United States from contracting with the United States, or the applicant willfully made any material false or misleading statement in his application or willfully omitted to state any material fact in connection with the application, or (ii) for other good cause shown; or

(C) in the case of an applicant for registration as futures commission merchant, if it is found after opportunity for hearing that the applicant has not established that he meets the minimum financial requirements under section 6f of this title: *Provided*, That pending final determination under clause (B) or (C), registration shall not be granted; *And provided further*, That the applicant may appeal from a refusal of registration under clause (B) or (C) in the manner provided in section 9 of this title. . . ."

instituted administrative proceedings, pursuant to §§ 6n(7) and 12a(2), to determine whether grounds existed for denying registration.

The Commission's administrative complaint charged as grounds for denial of registration, first, that John Forma, president and sole stockholder of British American, had been twice enjoined, by consent decree, from violating the record-keeping and net capital requirements of the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq., and had been barred by the SEC from certain activities in the securities industry as a result of various alleged violations of the securities laws and regulations. Second, the Commission charged that British American had been cheating, defrauding and deceiving purchasers and prospective purchasers of commodity options, through deceptive literature and oral misrepresentations concerning the risks and expected profits from trading in options and futures contracts, and concerning British American's role as principal in transactions with customers. The Commission stated both § 6n(7)[7] and the "other good cause" provision of § 12a(2)(B)(ii) as the alleged grounds for denying registration.[7] A hearing was held before an Administrative Law

[7] Section 12a originally applied only to futures commission merchants and floor brokers, but was expanded with the 1974 amendments to include commodity trading advisors and others. Section 6n, however, was entirely new with the 1974 amendments and applies only to commodity trading advisors and commodity pool operators. We see no reason to conclude that, through the enumeration in § 6n(7) of other, specific causes for denial of registration, Congress meant to exclude commodity trading advisors from the more general grounds established in § 12n(2) [sic], including the "other good cause" reason of § 12n(2)(B)(ii) [sic]. Indeed, Congress' specific *inclusion* of commodity trading advisors in § 12a, at the same time as the enactment of the new § 6n, plainly implies that Congress intended commodity trading advisors to be covered by both sections. In short, we see no essential disharmony between §§ 6n and 12a as they apply to commodity trading advisors, particularly since both sections explicitly establish the procedural

Judge from November 15 to December 15, 1976, but decision has not yet been rendered.

After the administrative complaint had been filed, but before the matter had come on for hearing, British American purportedly continued to function as a commodity trading advisor, although still unregistered. Consequently, on July 22, 1976, the Commission commenced this action for a preliminary injunction, which the district court denied on October 20, 1976.

III.

The district court found, for the limited purpose of the preliminary injunction motion,[8] that British American was a commodity trading advisor, 422 F. Supp. at 664-65. There is ample evidence in the record to support that finding. Eight witnesses testified that employees of British American had mailed brochures and pamphlets and had contacted customers on the telephone, offering opinions and advice and issuing analyses and reports concerning the value of commodities. Evidence of the literature mailed to customers was also in evidence, including British American's newsletters, "London Commodity Comments" and "Helpful Hints," as well as other mailings, all specifically touting commodity futures (and options on such futures) in rubber, coffee, sugar, cocoa, silver, etc. We note that while § 2 excludes certain persons from the definition of "com-

requirement of a hearing for the grounds alleged in this case. Section 6n(7) requires the Commission, in addition, to find that denial of registration is "in the public interest."

[8] In view of British American's continuing argument that it is not a commodity trading advisor, neither the district court's finding, nor our affirmance, should be construed to preclude the full exposition and resolution of this issue at the administrative level.

modity trading advisor" where the offering of advice is "solely incidental" to another registered or professional occupation, British American did not qualify for any of those exemptions.[9] In any event, British American's advising activities were neither "entirely gratuitous" nor mere "incidental expression of views." See S. Rep. No. 93-1131, 93d Cong., 2d Sess. 24 (1974). British American could only hope to profit if its customers and prospective customers, acting on its regular information and advice concerning the value and market prospects of commodities and commodity options, purchased such options, for, if they did, British American charged a healthy markup of up to 55%.[10]

The district court applied the now well-established rule that in actions for a statutory injunction, such as this, the agency need not prove irreparable injury or the inadequacy of other remedies as required in private injunctive suits, but only that there is a reasonable likelihood that the wrong will be repeated. See *SEC* v. *Management Dy-*

[9] See note 3, *supra*.

[10] We do not mean to suggest by this that options premiums alone must always constitute the necessary "compensation or profit" under the § 2 definition of commodity trading advisor. British American argues that, since it does not charge separately just for advice, it does not come within the definition. Nevertheless, as we have noted, British American does derive profit, albeit indirectly, from its advising activities, it qualifies for none of the professional exemptions in § 2 (although its subsequent application for registration as futures commission merchant is still pending), and in any event British American's advice clearly exceeds the "incidental" proviso of the exemptions in § 2.

Nor do we express any view on whether, in certain cases, persons may be required to register as both futures commission merchants and commodity trading advisors. It is clear from § 2 that futures commission merchants giving only incidental advice need not register as commodity trading advisors. Other situations outside the parameters of that exclusion, however, may provide proper cases for dual registration.

amics, Inc., 515 F.2d 801, 807-09 (2d Cir. 1975); *SEC* v. *Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1101 (2d Cir. 972); *CFTC* v. *J. S. Love & Assoc. Options, Ltd.*, 422 F. upp. 652, 661 (S.D.N.Y. 1976).[11]

The district court, however, exercising the equitable dis-retion vested with the court even in statutory injunctive ctions, see *Hecht Co.* v. *Bowles*, 321 U.S. 321, 328-30 1944); *Management Dynamics, supra*, 515 F.2d at 808, enied the preliminary injunction. The district court felt hat while the Commission had made a prima facie showing hat British American was offering commodity advice hile unregistered,

> "the mere continuation of business after the CFTC has found 'good cause' to deny registration is not the necessary repetition of a wrong to grant the injunction. Rather, there must be some indication that a wrong connected with fraud or misconduct, herein related to the alleged activity that led up to the consent decree, is to be repeated. The CFTC introduced no evidence of any illegal behavior of John Forma either leading up to the consent decree or repeated with British American. Absent such repetition, a preliminary injunction cannot be granted under the facts of this case." 422 F. Supp. at 667.

As we see it, the material question to be answered in this se is not whether the Commission was justified in chal-

[11] As the district court noted, the injunctive provision of § 13a-1 in all material respects similar to § 21(e) of the Securities Exange Act of 1934, 15 U.S.C. § 78u(e), and § 20(b) of the Securis Act of 1933, 15 U.S.C. § 77t(b), and case law developed under ose sections of the securities laws is pertinent to cases under 3a-1. See *CFTC* v. *J. S. Love & Assoc. Options, Ltd.*, 422 F. pp. 652, 661 (S.D.N.Y. 1976).

lenging British American's fitness for registration, or whether it had adequate grounds for denying registration altogether. Adjudication of those issues is clearly vested in the Commission. §§ 6n(7) and 12a(2). The material question here is simply whether the Commission made a prima facie showing that British American was violating, and likely to continue violating, the registration requirements of § 6m by using the mails or other means or instrumentalities of interstate commerce in connection with its business as a commodity trading advisor while unregistered. The record here compels an affirmative answer to that question.

A likelihood of future violations may be inferred from past unlawful conduct. In the present case, not only did British American maintain that its activities were legitimate, but it persisted in offering commodity trading advice right up to the day of the hearing in the district court. Under these circumstances, the likelihood of future violations, if not restrained, is clear. See *Management Dynamics, supra*, 515 F.2d at 807-08; *SEC* v. *First American Bank & Trust Co.*, 481 F.2d 673, 682 (8th Cir. 1973); *Manor Nursing Centers, supra*, 458 F.2d at 1100-01.

The district court erred in concluding that the "mere" continuation of the proscribed activities is not the necessary repetition of a wrong to warrant the injunction unless there is, in addition, proof of fraud or misconduct. Congress has specifically found that the activities of commodity trading advisors affect substantially the transactions on commodity markets, see 7 U.S.C. § 6*l*, and it has made the policy decision that the conduct of business by unregistered advisors is not in the public interest. Congress has also found that registration shall not be granted but upon proper application and scrutiny by the Commission, and it has established procedures and grounds for denial of regis-

Faced with the flat prohibition of § 6m against
e facilities of interstate commerce to give com-
dvice unless registered, violations of that prohibi-
"wrongs" which, if likely to be repeated, must be
d. While fraud or misconduct may also be viola-
the Act, and may constitute grounds for denial of
ion, violations of § 6m alone are sufficient to re-
injunction in this case. Permitting unregistered
ty trading advisors unlawfully to continue furnish-
e would not only nullify this statutory prohibition,
d also undermine and perhaps destroy the whole
onal scheme of regulation in this highly sensitive
ublic trust. Refusal to enjoin such unregistered
could only serve to encourage commodity trading
to operate even though not registered, and even
ne Commission had asserted grounds and insti-
ceedings for withholding registration.

t in the district court's requirement that fraud or
ct be proven is the notion that the Commission
ve proven its grounds for denial of registration
American. We reject this suggestion. The Com-
ike the SEC in the securities area, is the "stat-
rdian" entrusted with the enforcement of the con-
scheme for safeguarding the public interest in
y futures markets. *Management Dynamics, supra,*
at 808. It possesses the resources and expertise
o a full investigation, exposition, understanding
l resolution of such technical problems as the
aluation of an application for registration, the
further inquiry (possibly including a hearing),
ns for delaying a hearing, and ultimately, the
of grounds for granting or denying an applica-

Premature consideration of these matters, vested with the Commission in the first instance, would enmesh the court in a technical thicket which it should avoid, at least until the Commission has an opportunity to complete its initial investigatory and adjudicatory functions. In the meantime, we see no justification for permitting continuing violations of § 6m, particularly in view of the clear statement of § 12a(2) that interim registration shall not be granted.

While there may be situations where the Commission's assertion of grounds for denial is so untenable as to warrant denial of an injunction, this is not such a case. The consent decrees against Forma at least arguably fall within the express language of § 6n(7)(B)(ii), which authorizes the Commission to deny commodity trading advisor registration when an officer or controlling person "is . . . enjoined by order, judgment or decree . . . from engaging in or continuing *any* conduct or practice in connection with . . . the purchase or sale of commodities or securities . . . ." (Emphasis added.)[12]

The Commission, furthermore, has alleged fraud and misleading statements by British American in connection with its *current* activities as a commodity trading advisor. The purpose of the hearing before the Commission is to investigate and adjudicate the issue of fact giving rise to these allegations. While the Commission did prematurely raise these issues in the district court, their resolution was, nevertheless, unnecessary if not wholly immaterial to the question of whether British American had already vio-

[12] We express no opinion on the Commission's view, expressed in its July 1975 release, "Standards for Denial of Registration," 40 Fed Reg. 28125-26, that a consent decree enjoining any conduct or practice in the securities field also constitutes "good cause" for refusal of registration under § 12a(2)(B)(ii).

probably continue violating the registra-
of the Act.

regrettable that Congress did not impose
itations on the Commission's administra-
,[13] and equally regrettable that the Com-
ed to act with more dispatch in this case,
ustification for federal courts to remedy
situation, pending administrative adjudi-
itting the continuance of activities so
ed by § 6m.

district court gave undue weight to the
interest of British American in con-
ful activities as a commodity trading ad-
e Commission is seeking to vindicate the
ne need to enforce the commodity trading
n "special emphasis in the district court's
ement Dynamics, supra, 515 F.2d at 809
ry imprimatur" given to enforcement pro-
ent to obviate the need for a finding of
y; a finding that future violations are
plies that a significant injury to the public
Id. at 808-09. Furthermore, "the public
conflict with private interest, is para-
Culpepper, 270 F.2d 241, 250 (2d Cir.
the extent that British American's busi-
ve succeeded through the unlawful fur-
while not registered, British American
its own peril. A court of equity is under
t illegitimate profits or advance business

, § 11 of the Securities Exchange Act of 1934,
uiring that registration hearings for brokers
held within 120 days of application, extend-
onal days for good cause. 15 U.S.C. § 78*o*(b)

which is conducted [illegally]." *FTC* v. *Thomsen-King & Co.,* 109 F.2d 516, 519 (7th Cir. 1940).

The injunction here at issue would restrain only the use of facilities of interstate commerce in furnishing commodity trading advice, and to the extent that British American has succeeded and can continue to function through other *facilities,* the injunction would have no effect. We see no merit in the principle that the most successful illegal operations, which by their very size and number of customers exert a greater influence on the commodities markets, should be insulated from the registration requirements of the Act. While there is always some measure of equitable discretion even in statutory injunctive actions, *Hecht, supra; Management Dynamics, supra,* we see no room for the exercise of that discretion in this case.

We do not hold here that the district court must become a rubber stamp and issue an injunction whenever the Commission applies for one. We hold simply that once the Commission has made a prima facie showing that violations of the registration provisions of the Act have occurred and are likely of repetition and that the Commission has a tenable basis for commencing administrative proceedings to inquire into an applicant's fitness, an injunction must issue.

We share the district court's concern and unfavorable view of the Commission's delay at the administrative level, and appreciate the difficulties confronting it in undertaking to resolve the elusive and irrelevant issues raised at the hearing. Nevertheless, we feel that the Commission, albeit confusingly, made out a "proper showing" for relief under § 13a-1, and the injunction should, therefore, have been issued.

Accordingly, we reverse and remand with direction to issue a preliminary injunction consistent with this opinion.

ppendix C

peals Dated August 26, 1977)

S COURT OF APPEALS
OND CIRCUIT

77-6002

e United States Court of Appeals,
ircuit, held at the United States
of New York, on the 26th day of
e hundred and seventy-seven.

RES TRADING COMMISSION,

Plaintiff-Appellant,

v.

MMODITY OPTIONS CORPORATION,

Defendant-Appellee.

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hat the motion made herein by
dated August 11, 1977 to issue
e and it hereby is granted.

/s/ WALTER R. MANSFIELD,
/s/ WILLIAM H. TIMBERS
Circuit Judges
/s/ LLOYD F. MACMAHON
District Judge

COURT OF APPEALS
D CIRCUIT
FILED
26 1977
FUSARO, CLERK

Appendix D

(Order of Court of Appeals Dated September 27, 1977)

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 77-6002

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of September, one thousand nine hundred and seventy-seven.

Present:

HON. WALTER R. MANSFIELD,
HON. WILLIAM H. TIMBERS,
Circuit Judges
HON. LLOYD F. MACMAHON,
District Judge

COMMODITY FUTURES TRADING COMMISSION,

Plaintiff-Appellant,

v.

BRITISH AMERICAN COMMODITY OPTIONS CORP.,

Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the defendant-appellee.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO,
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
SEP 27 1977
A. DANIEL FUSARO, CLERK

ix E
ary Injunction)
ISTRICT COURT
TRICT OF NEW YORK
3247

ADING COMMISSION,
Plaintiff,

ODITY OPTIONS CORP.,
Defendant.

on October 6, 1976, upon
for preliminary and per-
onsidered Plaintiff's com-
vith, the memorandum or
upport of Plaintiff's mo-
n, the testimony of Plain-
l the argument of counsel
has jurisdiction over the
hat defendant, unless pre-
violate federal commodi-
therwise fully advised in

ED AND DECREED that the
modity Options Corp., its
yees, successors, assigns,
affiliates and those per-

sons in active concert or participation with it who receive actual notice of this Order by personal service or otherwise, and each of them, singly or in concert, directly and indirectly, be and they are hereby temporarily restrained from, directly or indirectly, using the mails or any other means or instrumentalities of interstate commerce for the purposes of engaging in the business of advising others, through publications, writings or otherwise, respecting the value of commodities for future delivery on or subject to the rules of contract markets or otherwise, or from disseminating oral or written analyses of reports concerning commodities irrespective of whether traded on contract markets, unless it is registered with the Commodity Futures Trading Commission as a commodity trading adviser in accordance with the requirements of Section 4m of the Commodity Exchange Act, as amended, 7 U.S.C. 6m.

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this cause to assure compliance with this order.

/s/ CHARLES E. STEWART, *J.*
United States District Judge
For Hon. Lee P. Gagliardi

Dated: 9/6/77

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prior to the enactment of the Commodity Futures Trading Commission Act of 1974, which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty", contrary to any rule, regulation, or order of the Commission prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe within one year after the effective date of the Commodity Futures Trading Commission Act of 1974 unless the Commission determines and notifies the Senate Committee on Agriculture and Forestry and the House Committee on Agriculture that it is unable to prescribe such terms and conditions within such period of time: *Provided,* That any such order, rule, or regulation may be made only after notice and opportunity for hearing: *And provided further,* That the Commission may set different terms and conditions for different markets."

3. 7 U.S.C. § 6m:

"It shall be unlawful for any commodity trading advisor or commodity pool operator, unless registered under this chapter, to make use of the mails or any means or instrumentality of interstate commerce in connection with his business as such commodity trading advisor or commodity pool operator: *Provided,* That the provisions of this section shall not apply to any commodity trading advisor who, during the course of the preceding twelve months, has not furnished commodity trading advice to more than fifteen persons and who does not hold himself out generally to the public as a commodity trading advisor."

4. 7 U.S.C. § 6n(7):

"(7) The Commission after hearing may by order deny registration, revoke or suspend the registration of any commodity trading advisor or commodity pool operator if the Commission finds that such denial, revocation, or suspension is in the public interest and that—

(A) the operations of such person disrupt or tend to disrupt orderly marketing conditions, or cause or tend to cause sudden or unreasonable fluctuations or unwarranted changes in the prices of commodities;

(B) such commodity trading advisor or commodity pool operator, or any partner, officer, director, person performing similar function or controlling person thereof—

(i) has within ten years of the issuance of such order been convicted of any felony or misdemeanor involving the purchase or sale of any commodity or security, or arising out of any conduct or practice of such commodity trading advisor or commodity pool operator or affiliated person as a commodity trading advisor or commodity pool operator; or

(ii) at the time of the issuance of such order, is permanently or temporarily enjoined by order, judgment or decree of any court of competent jurisdiction from acting as a commodity trading advisor, commodity pool operator, futures commission merchant, or floor broker, or as an affiliated person or employee of any of the foregoing, or from engaging in or continuing any

conduct or practice in connection with any such activity or in connection with the purchase or sale of commodities or securities; or

(C) any partner, officer, or director of such commodity trading advisor or commodity pool operator, or any person performing a similar function or any controlling person thereof is subject to an outstanding order of the Commission denying trading privileges on any contract market to such person, or suspending or revoking the registration of such person as a commodity trading advisor, commodity pool operator, futures commission merchant, or floor broker, or suspending or expelling such person from membership on any contract market."

5. 7 U.S.C. § 12a(2):

"The Commission is authorized—

* * * * *

(2) to refuse to register any person—

(A) if the prior registration of such person has been suspended (and the period of such suspension shall not have expired) or has been revoked;

(B) if it is found, after opportunity for hearing, that the applicant is unfit to engage in the business for which the application for registration is made, (i) because such applicant, or, if the applicant is a partnership, any general partner, or, if the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, at any time engaged in any practice of the character prohibited by his chapter or was convicted of a felony in any State or Federal

court, or was debarred by any agency of the United States from contracting with the United States, or the applicant willfully made any material false or misleading statement in his application or willfully omitted to state any material fact in connection with the application, or (ii) for other good cause shown; or

(C) in the case of an applicant for registration as futures commission merchant, if it is found after opportunity for hearing that the applicant has not established that he meets the minimum financial requirements under section 6f of this title: *Provided,* That pending final determination under clause (B) or (C), registration shall not be granted: *And provided further,* That the applicant may appeal from a refusal of registration under clause (B) or (C) in the manner provided in section 9 of this title; and . . ."

6. 7 U.S.C. § 13a-1:

"Whenever it shall appear to the Commission that any contract market or other person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of this chapter or any rule, regulation, or order thereunder, or is restraining trading in any commodity for future delivery, the Commission may bring an action in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such act or practice, or to enforce compliance with this chapter, or any rule, regulation or order

thereunder, and said courts shall have jurisdiction to entertain such actions: *Provided,* That no restraining order or injunction for violation of the provisions of this chapter shall be issued ex parte by said court. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the Commission, the district courts of the United States and the United States courts of any territory or other place subject to the jurisdiction of the United States shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder, including the requirement that such person take such action as is necessary to remove the danger of violation of this chapter or any such rule, regulation, or order: *Provided,* That no such writ of mandamus, or order affording like relief, shall be issued ex parte. Any action under this section may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or in the district where the act or practice occurred, is occurring, or is about to occur, and process in such cases may be served in any district in which the defendant is an inhabitant or wherever the defendant may be found. In lieu of bringing actions itself pursuant to this section, the Commission may request the Attorney General to bring the action. Where the Commission elects to bring the action, it shall inform the Attorney General of such suit and advise him of subsequent developments."

Appendix F—Principal Statutes Involved

U.S.C. § 558(c):

c) When application is made for a license required
aw, the agency, with due regard for the rights and
lleges of all the interested parties or adversely
ted persons and within a reasonable time, shall
nd complete proceedings required to be conducted
cordance with sections 556 and 557 of this title or
proceedings required by law and shall make its
ion. Except in cases of willfulness or those in
h public health, interest, or safety requires other-
the withdrawal, suspension, revocation, or an-
ent of a license is lawful only if, before the insti-
n of agency proceedings therefor, the licensee has
given—

(1) notice by the agency in writing of the facts
conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve com-
ance with all lawful requirements.

the licensee has made timely and sufficient ap-
ion for a renewal or a new license in accordance
agency rules, a license with reference to an ac-
of a continuing nature does not expire until the
cation has been finally determined by the agency."

Appendix G

(Principal Regulations Involved)

§ 1.3(bb):

"The following terms, as used in the Commodity Exchange Act, or in the rules and regulations in this chapter, shall have the meanings hereby assigned to them, unless the context otherwise requires:

* * * * *

(bb) *Commodity trading advisor.* This term means any person who, for compensation or profit, engages in the business of advising others, either directly or through publications or writings, as to the value of commodities or as to the advisability of trading in any commodity for future delivery on or subject to the rules of any contract market, or who for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning commodities; but does not include (i) any bank or trust company, (ii) any newspaper reporter, newspaper columnist, newspaper editor, lawyer, accountant, or teacher, (iii) any floor broker or futures commission merchant, (iv) the publisher of any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation including their employees, (v) any contract market, and (vi) such other persons not within the intent of this definition as the Commission may specify by rule, regulation, or order: *Provided,* That the furnishing of such services by the foregoing persons is solely incidental to the conduct of their business or profession."

Supreme Court, U. S.
FILED
MAR 3 1978
MICHAEL RODAK, JR., CLERK

No. 77-919

eme Court of the United States

October Term, 1977

RICAN COMMODITY OPTIONS CORP.,
PETITIONER

v.

FUTURES TRADING COMMISSION

A WRIT OF CERTIORARI TO THE UNITED OF APPEALS FOR THE SECOND CIRCUIT

HE COMMODITY FUTURES TRADING MMISSION IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

AN,
ounsel,
DEL,
Counsel,
E,

tures Trading Commission,
n, D.C. 20581.

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4)	3
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S.C. 6n(7)(B)(ii)	2, 3
	3
	2, 5, 8
(2)	2, 3, 4, 5, 11, 12
34, 48 Stat. 881, as	
78a, *et seq*	5
	14

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-919

BRITISH AMERICAN COMMODITY OPTIONS CORP.,
PETITIONER

v.

COMMODITY FUTURES TRADING COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE COMMODITY FUTURES TRADING COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 560 F. 2d 135. The opinion of the district court (Pet. App. A) is reported at 422 F. Supp. 662.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1977. A timely petition for rehearing was denied on September 27, 1977. The petition for a writ of certiorari was filed on December 27, 1977. The

ity of interstate commerce, in connection with his business as such * * *."[1]

To assure that unsuitable persons do not act as commodity trading advisors, Congress in Section 4n (7) of the Act, 7 U.S.C. 6n(7), authorized the Commission, after hearing, to deny registration to any person if the Commission finds that such denial is "in the public interest" and that the applicant or any officer, director or controlling person of the applicant has engaged in certain disqualifying conduct or is subject to a specific enumerated disability, including being "permanently * * * enjoined by order, judgment or decree of any court * * * from engaging in or continuing any conduct or practice * * * in connection with the purchase or sale of * * * securities * * *." Section 4n(7)(B)(ii), 7 U.S.C. 6n(7)(B)(ii). The Commission is also empowered under Section 8a(2), 7 U.S.C. 12a(2), to refuse to register a commodity trading advisor if, after opportunity for hearing, the applicant is found unfit to engage in the activity for which registration is sought, *inter alia,* "because such applicant * * * at any time engaged in any practice of the character prohibited by this [Act] or * * * for * * * other good cause shown * * *."

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[1] In addition Congress also imposed upon commodity trading advisors various recordkeeping, reporting, disclosure and other regulatory requirements. See Sections 4n(4) and 4*o* of the Act, 7 U.S.C. 6n(4) and 6*o*.

Pursuant to Section 4n(2) of the Act, 7 U.S.C. 6n (2), registration as a commodity trading advisor ordinarily will become "effective thirty days after the receipt of * * * [an] application by the Commission * * *." Pending a final determination of an applicant's fitness for registration in an administrative proceeding held for that purpose, however, Section 8a(2) provides that "registration shall not be granted."

2. The evidence, as set forth in the opinion of the court of appeals (Pet. App. 30a–32a), established that in October 1975—five months after the registration requirement for commodity trading advisors became effective—petitioner commenced to offer and sell commodity options to the public.[2] In doing so, petitioner routinely advised customers by telephone and through the mails as to the value of commodities and provided the public with analyses and reports concerning commodities, receiving compensation through the sale of options to its customers. Nevertheless, it was not until March 17 or 18, 1976, that petitioner applied to the Commission for registration as a commodity trading advisor.

On April 16 1976, the Commission instituted an administrative proceeding, pursuant to Sections 4n(7)

[2] "A 'commodity option' is a contractual right to buy, or sell, a commodity or commodity future by some specific date at a specified, fixed price, known as the 'striking price.' A contract entitling its owner to purchase the commodity is known as a 'call,' and a contract entitling its owner to sell is called a 'put'." *British American Commodity Options Corp.* v. *Bagley*, 552 F. 2d 482, 484–485 (C.A. 2), certiorari denied, November 7, 1977 (Nos. 77–96, 77–204).

and 8a(2) of the Act, 7 U.S.C. 6n(7), 12a(2), to determine whether petitioner should be registered.[3] Although the administrative complaint expressly notified petitioner that in accordance with Section 8a(2), registration would not be granted pending a final determination of the petitioner's fitness for registration, petitioner continued to offer commodity trading advice to its option customers.

3. The Commission, in July 1976, instituted an action in the United States District Court for the Southern District of New York under Section 6c of the Act, 7 U.S.C. 13a–1, to enjoin petitioner from further violation of the registration requirement for commodity trading advisors. At the conclusion of the Commission's case the district court granted petitioner's motion for a directed verdict and denied the Commission's motion for preliminary injunction (Pet. App. 1a–14a). The court noted that the Commission

[3] See pp. 3–4, *supra*. The administrative complaint alleged that (1) in 1970 and 1973, John Forma, petitioner's president and sole shareholder, had been twice enjoined by a federal court from violating the Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. (1970 ed.) 78a *et seq.*, and the regulations thereunder, and in 1975 had been barred by the Securities and Exchange Commission from further association with any broker, dealer, registered investment company or registered investment adviser; (2) since October 1975, petitioner had engaged in the business of offering commodity trading advice without being registered with the Commission as a commodity trading advisor; (3) since October 1975, petitioner had been and was engaged in cheating and defrauding purchasers and prospective purchasers of commodity options in violation of anti-fraud provisions under the Act; and (4) petitioner had refused the Commission's staff access to petitioner's books and records.

ad offered no proof that petitioner was defrauding r misleading its customers, and stated that the issu- nce of a temporary injunction in these circumstances ould be "too harsh a result," in view of the adverse ffect of an injunction on petitioner's reputation and legitimate" business activities (Pet. App. 12a–13a).

The court of appeals reversed and remanded for ntry of a preliminary injunction (Pet. App. 24a–9a). It accepted the district court's finding (Pet. pp. 6a, 32a) that petitioner, although not registered, as continuing to act as a commodity trading ad- isor. On this basis, the court of appeals determined nat the Commission had made a *prima facie* showing nat petitioner was violating and would continue to iolate the Act's registration requirements. It held Pet. App. 39a):

> [O]nce the Commission has made a prima facie showing that violations of the registration provisions of the Act have occurred and are likely of repetition and that the Commission has a tenable basis for commencing administrative proceedings to inquire into an applicant's fitness, an injunction must issue.

The court of appeals rejected the district court's ew that proof of fraud or other misconduct was ecessary before petitioner's activities could be en- oined, concluding that proof of violations of the reg- tration requirement "alone are sufficient to require e injunction in this case" (Pet. App. 36a). The court ased its determination on Congress' intent, manifest the Act's statutory scheme, that "persons engaged

in the defined regulated activities within the commodities business are not to operate without being registered" and that the Commission be "empowered to seek injunctive prohibitions against violations of any provisions of the Act, including registration provisions" (Pet. App. 30a).

The court also ruled that the district court had given undue weight to the private business interest of petitioner in continuing its unlawful activities as a commodity trading advisor. It found that "to the extent that * * * [petitioner's] business activities have succeeded through the unlawful furnishing of advice while not registered, * * * [petitioner] has been acting at its own peril" and "[a] court of equity is under no duty 'to protect illegitimate profits or business which is conducted illegally'" (Pet. App. 38a–39a) (citation omitted).

ARGUMENT

The decision of the court of appeals is correct and the petition presents no question warranting review by this Court.

1. Because the injunctive relief contemplated by Section 6c, like that provided by other regulatory legislation, is remedial in nature, designed to prevent injury to the public and to deter future illegal conduct,[4] restrictive concepts traditionally associated with

[4] *E.g.*, *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 193; *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329; *Securities and Exchange Commission* v. *World Radio Mission, Inc.*, 544 F. 2d 535, 541 (C.A. 1); *Securities and Exchange Commission* v. *Management Dynamics, Inc.*, 515 F. 2d

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litigation such as proof of irreparable injury equacy of other remedies, are inapplicable.[5] courts have consistently held that an enforce- ency such as the Commission has made the showing for a preliminary injunction if it ented a *prima facie* case that the defendant aged, or is engaging, in unlawful conduct, demonstrated a "reasonable likelihood of iolations."[6]

C.A. 2). The court of appeals and other courts have the case law developed under the federal securities laws arly pertinent to proceedings under Section 6c (Pet. See also *Commodity Futures Trading Commission* v. *lony Commodity Options, Ltd.*, 434 F. Supp. 911, 919 ; *Kelly* v. *Carr*, CCH Comm. Fut. L. Rep. ¶ 20,517, 133 (W.D. Mich.); *Commodity Futures Trading Com- J. S. Love & Associates Options, Ltd.*, 422 F. Supp. 652, .Y.).

es and Exchange Commission v. *Capital Gains Re- eau, Inc.*, *supra*, 375 U.S. at 195; *Securities and Ex- mmission* v. *Management Dynamics, Inc.*, *supra*, 515 F. *Securities and Exchange Commision* v. *Manor Nursing c.*, 458 F. 2d 1082, 1102 (C.A. 2); *Kelly* v. *Carr*, *supra*, n. Fut. L. Rep. ¶ 20,517, at p. 22,133; *Commodity Fu- ing Commission* v. *J. S. Love & Associates Options*, 442 F. Supp. at 661.

curities and Exchange Commission v. *Management Dy- ., supra*, 515 F. 2d at 807; *Securities and Exchange* v. *First American Bank & Trust Co.*, 481 F. 2d 673, A. 8); *Securities and Exchange Commission* v. *Manor nters, Inc.*, *supra*, 458 F. 2d at 1100; *Securities and Commission* v. *Keller Corp.*, 323 F. 2d 397, 402 (C.A. dity Futures Trading Commission* v. *Crown Colony Options, Ltd.*, *supra*, 434 F. Supp. at 919; *Kelley* v CCH Comm. Fut. L. Rep. ¶ 20,517, at p. 22,133.

The court of appeals applied this well-settled standard in determining that the Commission was entitled to injunctive relief on the showing it made. As the court stated (Pet. App. 35a):

> [L]ikelihood of future violations may be inferred from past unlawful conduct. In the present case, not only did British American maintain that its activities were legitimate, but it persisted in offering commodity trading advice right up to the day of the hearing in the district court. Under these circumstances, the likelihood of future violations, if not restrained, is clear.

2. Petitioner nevertheless contends (Pet. 8–9) that the court of appeals denied petitioner a hearing in the district court by directing the entry of a preliminary injunction. But petitioner makes no claim of any material factual issue which might be addressed in a further hearing. To the contrary, petitioner does not dispute—and did not dispute in the district court[7]—that it offered commodity trading advice to customers through the mails and other instrumentalities of interstate commerce; that it was not registered with the Commission as a commodity trading advisor; and that it continued to do business in an unregistered capacity until enjoined by the district court. Petitioner thus has admitted the facts necessary to support an injunction and reopening the hearing would serve no useful purpose. Due process does not require

[7] See Court of Appeals Appendix 102–103.

hearing where no factual controversy
litigant seeks only to contravene the
o be applied.[8]
court of appeals "[preclude] the Dis-
n exercising its equitable discretion"
e a district court has broad latitude in
able remedies, an appellate court may
junction issue where necessary "effec-
ess proved violations" of law. *United*
lu Pont de Nemours & Co., 366 U.S.
er similar circumstances involving
ng violations of law, courts of appeals
ruled that injunctive relief was re-
urities and Exchange Commission v.
ission, Inc., supra, 544 F.2d at 541;
Cosa Del Transporte, Inc., 167 F.2d
1); *Walling* v. *Panther Creek Mines,*
C.A. 7). In *Albemarle Paper Co.* v.
405, 416, this Court explained:

etionary choices are not left to a
nclination, but to its judgment; and

gan County, Inc. v. *Federal Power Commis-*
5. 1128 (C.A. D.C.); *Virginia Electric and*
l Power Commission, 351 F. 2d 408, 410 (C.A.
rt & Isbrandtsen Lines v. *Federal Maritime*
2d 185, 194 (C.A. 9); *Producers Livestock*
United States, 241 F. 2d, 192, 196 (C.A. 10).
nver Union Stockyard Co. v. *Producers Live-*
n, 356 U.S. 282.
er cites (Pet. 8–10), unlike the instant case.
lentiary proceedings to resolve material issues

its judgment is to be guided by sound legal principles."

3. Although petitioner claims (Pet. 11) that "7 U.S.C. 12(a)(2) is [u]nconstitutional," its argument appears not to be that Section 12[a] (2) is unconstitutional on its face, but rather that the Commission in this case unnecessarily prolonged the proceeding on petitioner's application for registration, thus allegedly forcing petitioner out of business "in contravention of every known concept of due process and fair play" (Pet. 14). That argument is unfounded.

The Commission would have shirked its statutory responsibility if it had rendered a decision concerning petitioner's fitness for registration without full development of the facts. In this case, the proper discharge of the Commission's responsibility required a thorough adjudicative proceeding on petitioner's fitness, and there is no evidence that the Commission acted other than in good faith.

Furthermore, petitioner itself is responsible for much of the delay in reaching a decision. Petitioner acted to prolong the administrative proceeding[9] and sought to enjoin it. *British American Commodity Options Corp.* v. *Bagley,* S.D. N.Y., 76 Civ. 1984. If petitioner had at any time believed it was being prejudiced by delay in the administrative proceeding, it could have brought an action under the Administrative Procedure Act to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. (1976 ed.) 706(1).

[9] See Court of Appeals Appendix at 166–167.

ourt of appeals did not decide
)(2) was unfairly applied to
ue is not involved in this case.
ated in a petition for review of
l of petitioner's application for
odity trading advisor, which is
urt of Appeals for the Second
ican Commodity Options Corp.
Trading Commission, C.A. 2,

argument misconceives the
(a)(2). By its terms, that sec-
proceedings for suspension or
ing license;[11] it relates solely
thority to refuse applicants for
on 12(a)(2) directs that reg-
granted" until after a fitness
otherwise a mere applicant,
een established, could lawfully
nce Section 4m of the Act, 7
y person from offering com-
before it is registered, a firm
l awaits determination of its
re giving trading advice will
able injury as a result of the
scribes.

ent (Pet. 15–16) that the Commis-
oner's application for registration is
t.

e on *Barchi* v. *Sarafan*, 436 F. Supp.
d, since it involved a summary sus-
a person, unlike petitioner, who was
a particular occupation.

4. Petitioner also argues (Pet. 11) that, because it was lawfully operating as a commodity option dealer without a license prior to the time it applied for registration with the Commission as a commodity trading advisor, it was entitled under section 9(b) of the Administrative Procedure Act, 5 U.S.C. (1976 ed.) 558(c), to operate as a commodity trading advisor until the Commission acted on its application, citing *Pan-Atlantic Steamship Corp.* v. *Atlantic Coast Line Railroad Co.*, 353 U.S. 436.

Section 9(b) provides in pertinent part:

> When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

The purpose of this provision is "to protect a person *with a license* from the damage he would suffer by being compelled to discontinue a business of a continuing nature, only to start it anew after the administrative hearing is concluded." *Pan-Atlantic Steamship Corp.* v. *Atlantic Coast Line Railroad Co., supra,* 353 U.S. at 439 (emphasis added). See also *Committee for Open Media* v. *Federal Communications Commission,* 543 F. 2d 861, 867 (C.A.D.C.). For Section 9(b) to apply, "there must be a license outstanding" and there "must have been filed a timely and sufficient application to continue the existing operation." *Pan-Atlantic, supra,* 353 U.S. at 439. Since petitioner has never been licensed as a commodity trading advisor, and did not make "timely" applica-

activity for which the
t invoke Section 9(b).[12]
in no position to claim
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pplicants beginning on
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trading advisor until
after the registration

ertion (Pet. 11), the Com-
t of appeals did not hold—
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of appeals hold the sale of
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39a).
pplied for registration as a
lawfully to sell commodity
7 C.F.R. 32.3. The Commis-
e Matter of British Ameri-
TC Docket Nos. 76–15 and
209.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN G. GAINE,
General Counsel,
RICHARD E. NATHAN,
Deputy General Counsel,
FREDERIC T. SPINDEL,
Associate General Counsel,
RICHARD A. LEVIE,
Special Counsel,
MARK D. YOUNG,
Attorney,
Commodity Futures Trading Commission.

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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-919

BRITISH AMERICAN COMMODITY OPTIONS CORP.,

Petitioner,

—against—

THE COMMODITY FUTURES TRADING COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

CHARLES J. HECHT
Attorney for Petitioner
Suite 1760
60 East 42nd Street
New York, New York 10017
(212) 490-3232

Of Counsel:

HAIG COSTIKYAN

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BRITISH AMERICAN COMMODITY OPTIONS CORP.,

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—against—

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER BRITISH AMERICAN COMMODITY OPTIONS CORP.

Set forth below is the Reply Brief of Petitioner, British American Commodity Options Corp. ("British American") in support of its prayer that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on August 3, 1977.

The Respondents, Commodity Futures Trading Commission ("CFTC"), do not dispute a number of material facts as set forth in British American's Petition herein, which British American would have presented in the District Court had it had the opportunity of a hearing. It is submitted these facts would have amply supported the District Court's exercise of discretion in denying the issuance of a preliminary injunction.

At the time British American commenced business
tober 1975 the CFTC had taken no steps to regulate
odity option dealers such as British American except
ne promulgation of an anti-fraud rule.

At the time British American commenced business in
er 1975 the CFTC had not determined whether it had
liction and if so the extent of its jurisdiction over
odity option dealers or whether or not to ban or regu-
such industry.

After British American commenced business the
C for the first time announced it was considering
for the regulation of commodity options and re-
ed comments from the public (40 Fed. Reg. 49360
)). The first indication that commodity option deal-
ight be required to register as commodity trading ad-
s is contained in a footnote to such request for com-
s. Under 7 U.S.C. §6c(b) it is clear that Congress
lly intended that London commodity option dealers
emed a completely separate category than other per-
or firms subject to the CFTC's jurisdiction.

The CFTC staff was aware of British American's
nce from inception and made numerous visits to its
ses to review its marketing literature, back office
etc. While the CFTC at no time asserted that it had
liction, such information was supplied by British
ican on a purely voluntary basis.

On January 21, 1976, the CFTC published its first
ations with respect to commodity trading advisors,
ive February 20, 1976 (41 Fed. Reg. 3191).

On February 20, 1976 the CFTC published proposed
which would, if adopted, require commodity option
s to register as "commodity option dealers" (41
Reg. 7774).

7. British American was one of the first commodity option dealers to apply for registration as a commodity trading advisor.

It is submitted that had British American been given the opportunity to present its case, which was wrongfully denied to it by the Circuit Court mandate, the District Court could and should have found that British American had commenced operations and had a going business prior to the first hint of any registration requirement.[1] Such a finding by the District Court would have provided ample support for the exercise of its discretion to deny the injunction requested by the CFTC.

Furthermore, the cases cited by the CFTC do not support its companion propositions that British American was not entitled to a hearing and that the Circuit Court did not preclude an exercise of discretion by the District Court. In each of the cases cited there either was a full hearing or equivalent, or a hearing was waived. In none of the cases cited was a party such as British American denied its right to present its case in a proceeding for a preliminary injunction.

The unconstitutionality of 7 U.S.C. §12a(2) it is submitted lies in the fact that as interpreted by the Circuit

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[1] Since the definition of "commodity trading advisor" is clearly patterned after §202(a)(ii) of the Investment Advisors Act of 1940, as amended, absent clarifying regulations it could reasonably be assumed brokers such as British American were not intended to be covered as the "commodity trading advice" was only incidental to its activities as a commodity options broker. The District Court at footnote 3 held that the issue of whether or not British American was a commodity trading advisor was to be determined in the administrative proceeding. See *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U.S. 173, 82 S. Ct. 1237, 8 L. Ed. 2d 418 (1962); *Pan American World Airways* v. *United States*, 371 U.S. 296, 83 S. Ct. 476, 9 L. Ed. 2d 325 (1963) and *Federal Power Commission* v. *Louisiana Light & Power*, 402 U.S. 621, 92 S. Ct. 1827, 32 L. Ed. 2d 369 (1972).

its the CFTC without limitation to force a
as British American, which was lawfully
ongoing business prior to the incidence of a
heme, out of business without a hearing
ging "other good cause" in an administrative
declining to act on its application for reg-

apologia that the almost 2 years between
he administrative complaint against British
the CFTC order denying it registration
e exercise of its statutory responsibility is
by the record, is without legal foundation
ble in view of the District Court's finding in
hat "[w]hile the CFTC's failure to hold a
is not a violation of the Commodities Ex-
may in some instances be violative of consti-
rocess". (Pet. App. 22a) Furthermore, the
found that it was "regrettable that Congress
specific time limitations on the Commission's
proceedings and equally regrettable the
as failed to act with more dispatch in this
neously held there was no justification for a
o "remedy this unfortunate situation" (Pet.
nery, what then is the function of the federal
nistrative law?

ve proceeding instituted by British American ref-
CFTC (Resp. 11) *British American Commodity*
Bagley, S.D.N.Y. 76 Civ. 1984, did not seek to
nistrative hearing but the improper contacting of
n's customers using lists obtained by the CFTC
enses and using improper investigative techniques
mes, addresses and entrapment. At no time did
n bring any proceeding to enjoin or delay the
earing relating to its commodity trading advisor
if permitted, would have shown at the eviden-
at all delays were requested by the staff of the
respondents' objections to such delays, while the
pting to obtain evidence to support its allegations,
ssful.

WHEREFORE, the undersigned on behalf of the petitioner, respectfully requests that certiorari be granted.

Respectfully submitted,

CHARLES J. HECHT
Attorney for Petitioner
Suite 1760
60 East 42nd Street
New York, New York 10017
(212) 490-3232

Of Counsel:
HAIG COSTIKYAN